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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 24, Original

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "B"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR RESPONDENTS IN SUPPORT OF RETURN TO THE RULE

GROUNDS OF JURISDICTION

This case, like Nos. 23 and 25, Original, is a petition by the State of Maryland for a writ of mandamus to the District Court of the United States for the District of Maryland. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156).

On October 12th, 1925, this Court granted a rule to show cause why a peremptory writ should not issue. The rule was made returnable on or before November 16th, 1925.

STATEMENT

The purpose of the petition is to compel the District Court to remand to the Circuit Court of the State for Harford County an indictment charging four Federal Prohibition Agents and their chauffeur with the crime of conspiracy to obstruct justice. The same five persons are also the objects of a prosecution for murder, which gives rise to Case A. (Original, No. 23.)

Most of the facts in the present case have been already set forth in the respondent's brief in Case A, at pages 2–5. For convenience, they will be briefly recapitulated.

Four of the defendants (Ford, Barton, Ely, and Stevens) were duly appointed Federal Prohibition Officers. Their commissions empowered them—

> to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors* * * * and to execute and perform all the duties delegated to such officers by law. (Exhibit A to Petition of the State of Maryland, pp. 44-45.)

The fifth defendant, Trabing, was a chauffeur. During the period covered by the indictment he was in the employ of the Federal Prohibition Director for the State of Maryland and was acting as chauffeur and helper to the other four defendants.

(Exhibit A to Petition of the State of Maryland, p. 45.)

On November 19th, 1924, the defendants were ordered by the Federal Prohibition Director for Maryland to investigate the alleged unlawful distilling of liquor on an unoccupied farm near the village of Madonna, Maryland. They went there by motor, arriving shortly after noon, and discovered in a secluded valley the materials for illicit distilling. They hid themselves in the woods. Soon afterwards a number of men came up, carrying a still. When the officers made their presence known, the men dropped the still and fled. The officers pursued but failed to arrest anyone. They thereupon returned to the still, destroyed the materials, and proceeded back to their car to return to Baltimore and report the affair to their superior. On their way to the car, about 400 or 500 yards from the site of the still, they found a man (Wenger) lying mortally wounded. They picked him up and took him in their car to Jarrettsville and thence to Bel Air in search of a doctor. By the time one was found, the man was dead. The officers then at once reported the matter to the State's Attorney in Bel Air. Upon learning that his informants were Prohibition Officers, the State's Attorney at once ordered all five to be placed under arrest. They were confined in the local jail that night. The next day they gave further infor-

mation to the State officials and to the Coroner's Jury. The charge of conspiracy which gives rise to the present case was predicated upon an alleged agreement by the defendants to withhold material testimony from the Coroner's Jury. On the evening of November 20th the defendants were released on bail at the instance of the United States Attorney. (Exhibit A to petition of the State of Maryland, pp. 33–35.)

In February, 1925, an indictment against the defendants for conspiracy to obstruct justice was returned by the grand jury of the State to the Circuit Court for Harford County. The defendants petitioned for removal of the cause, under Section 33 of the Judicial Code. Removal was granted. Subsequently the State of Maryland moved to quash the order of removal and to remand the prosecution to the State Court. After argument upon this motion, leave was granted to amend the petition for removal. The petition was accordingly amended to set forth in greater detail all the circumstances surrounding the indictment. Proper allegations were included, stating that the defendants were Federal officers, and that they had been acting in the discharge of their duties at the time when the alleged conspiracy was formed. The petition, however, directly denied that the defendants were guilty of the conspiracy, saying:

> That during November nineteenth and twentieth, nineteen hundred and twenty-

> four, your petitioners did discuss together the facts relating to the incidents aforementioned, but at no time did they combine nor conspire to obstruct justice as charged in said indictment.

The petitioners likewise stated that they had "freely and without reservation, in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned" to the Coroner's Jury. The petition alleged that the indictment for conspiracy was—

> a criminal prosecution on account of acts alleged to have been done by your petitioners at a time when they were engaged in the performance of their duties as Federal Prohibition Officers and chauffeur for Federal Prohibition Officers as set forth in aforegoing paragraphs.

Upon this amended petition, removal was granted. The State of Maryland again moved to quash the order of removal and to remand the cause. Its motion was denied. To compel the District Court to remand the cause, the State has now petitioned for a writ of mandamus from this Court.

ARGUMENT

SUMMARY

I. THE PROSECUTION FOR CONSPIRACY TO OBSTRUCT JUSTICE WAS PROPERLY REMOVABLE, NOTWITHSTANDING THAT THE DEFENDANTS EXPRESSLY DENIED HAVING CONSPIRED.

II. THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, AND CAN NOT BE CONTROLLED BY MANDAMUS.

I

THE PROSECUTION FOR CONSPIRACY TO OBSTRUCT JUSTICE WAS PROPERLY REMOVABLE, NOTWITHSTANDING THAT THE DEFENDANTS EXPRESSLY DENIED HAVING CONSPIRED.

Most of the questions of law arising in this case have been already discussed in the respondents' brief in Case A (No. 23, Original). Points I and II of that brief, in particular, dealt with the application of Section 33 of the Judicial Code and Section 28 of the National Prohibition Act to prosecutions against Federal Prohibition Agents. It is unnecessary to repeat in the present brief the argument on those points.

A few additional points, however, which did not arise in Case A, arise in this case, and must now be briefly considered.

Counsel for the State of Maryland strenuously urge that the indictment in the present case can not be removed, because the crime of conspiracy to obstruct justice is peculiarly a crime against the

sovereignty of the State, and because that crime can have no possible connection with the official duties of Federal officers. The argument is summarized in the State's two motions made in the District Court, to remand the present cause (Exhibit A to Petition for Mandamus, at pp. 26, 40):

> Because it is inconceivable that in the discharge of their duties as Federal Prohibition Agents of the Bureau of Internal Revenue of the Treasury Department of the United States it would be necessary for the said Robert D. Ford, John M. Barton, E. Franklin Ely, Wilton L. Stevens, and William Trabing to commit the crime of conspiracy to obstruct justice against the laws of the State of Maryland.

It may be quite true that the laws of the United States do not authorize or require its officers to conspire to obstruct the justice of any State. But neither do the laws of the United States require its officers to commit murder. Yet this Court has declared that "even the most unquestionable and most universally applicable of State laws, such as those concerning murder," will not be allowed to control the conduct of Federal officers in certain cases. *Johnson* v. *Maryland,* 254 U. S. 51. And in numberless instances Federal officers, accused in the State courts of murder, have been removed for trial to the Federal courts, or have even been released on *habeas corpus* without having to stand any trial at all.

In re Neagle, 135 U. S. 1.
Davis v. *South Carolina,* 107 U. S. 597.
Tennessee v. *Davis,* 100 U. S. 257.
Massachusetts v. *Bogan,* 285 Fed. 668.
Florida v. *Tooher,* 283 Fed. 845.
North Carolina v. *Kirkpatrick,* 42 Fed. 689.
Georgia v. *Port,* 3 Fed. 117.
Georgia v. *O'Grady,* Fed. Cas. No. 5352.

Where a Federal officer held in State custody claims the protection of the Federal Court, either by petition for *habeas corpus*, or by petition for removal, the court may look behind the actual indictment to ascertain whether the act was really done under color of Federal authority.

In re Neagle, 135 U. S. 1.
Virginia v. *Felts,* 133 Fed. 85.
Virginia v. *De Hart,* 119 Fed. 626.
Ex parte Jenkins, Fed. Cas. No. 7259.

Removal has been granted in many cases and upon an almost endless variety of charges. The following cases will serve as illustrations:

Findley v. *Satterfield,* Fed. Cas. No. 4792.
Virginia v. *Felts,* 133 Fed. 85.
Virginia v. *De Hart,* 119 Fed. 626.
Delaware v. *Emerson,* 8 Fed. 411.
Illinois v. *Moody* (unreported. See Appendix to Respondents' Brief in No. 23 Original, Case A).
Virginia v. *Bingham,* 88 Fed. 561.
Buttner v. *Miller,* Fed. Cas. No. 2254.
Warner v. *Fowler,* Fed. Cas. No. 17182.

It must be remembered, moreover, that in the case at bar, the accused, in their petition for removal, specifically denied that they had ever conspired. It is submitted that on this issue they are entitled to be tried in the Federal Court. It is not necessary for them to admit having done the act charged, in order to obtain removal of their cause. Such an admission in the case at bar would be a complete admission of guilt, which could presumably be used against them at their trial. To compel such an admission, it is submitted, would be a violation of the privilege against self-incrimination, *Boyd* v. *United States,* 116 U. S. 616. It would, in fact, leave nothing for either the Federal or the State court to try.

The question as to the necessity of an admission of the act charged has already been treated at length in the respondents' brief in Case A, at pages 20–27. Reference is made to the discussion there given and to the authorities there cited, particularly:

Tennessee v. *Davis,* 100 U. S. 257.
Alabama v. *Peak,* 252 Fed. 306.
Oregon v. *Wood,* 268 Fed. 975.

The purpose of the removal statute, as recognized by this Court in *Tennessee* v. *Davis,* is twofold—first, to protect the functions of the Federal Government from being hindered by the possible unfriendly action of States and to prevent its officers from being withdrawn from their duty and held in confinement by State authorities; and, sec-

ond, to protect the officers themselves. Both of these purposes can be defeated, as well by indictments for acts which the officers deny altogether, as by indictments for acts which the officers admit having done, but for which they claim justification under Federal law.

Counsel for the State of Maryland argue that at the time of the conspiracy here alleged the accused officers were in no sense acting in their official capacity. Their duty was discharged, it is said, when they destroyed the still, and at the time of the conspiracy they were lodged in the Maryland jail. And it is therefore argued that the indictment for conspiracy has no reasonable connection with their acts done under Federal authority.

But how did the officers come to be in jail? If they had not been engaged in the performance of their duties as Federal officers, they would never have been there. When they found Wenger's body, they had just come from performing their duty and were on their way back to report officially to their superior. At that time they were still acting in their official capacity. *United States* v. *Gleason*, 1 Wool. C. C. 128. In immediately seeking for a physician and in reporting Wenger's death at once to the State's Attorney, they were doing the only reasonable act which could be expected of them, both as public officers and as private citizens. But, as their petition alleges, the State's Attorney, "on being informed by them that your petitioners

* * * were prohibition officers," ordered them to be at once placed under arrest.

If they had not discovered Wenger and reported his murder, there would have been no need for them to testify before the Coroner's jury, and there would have been no occasion for any charge of conspiracy. The two charges, it is submitted, are so closely inter-related that they can not properly be separated. The charge of murder gave rise to the charge of conspiracy. If the former charge is removable to the Federal court, it is submitted that the latter should be removable also.

Considerable danger would be involved in a contrary holding. If charges of murder alleged to have been committed by Federal officers are removable, and charges of conspiracy and similar offenses are not removable, an obvious expedient would suggest itself. In localities where the administration of particular Federal laws is unpopular, Federal officers need no longer be dragged before hostile State tribunals on charges such as murder, on which they may successfully claim removal and plead self-defense. The charge can readily be altered to "conspiracy" or to some other crime, which the accused officers deny having committed at all, but on which it will be clear that removal can not be obtained. The actual charge will serve merely as a cloak to obtain the desired end, namely, incarceration of an unpopular officer. In this way the functions of the Federal Government may be

harassed or impeded and its officers withdrawn from their duty as effectively as by prosecution for homicide actually committed in self-defense. This method may easily become as effective as out-and-out nullification of Federal laws.

It is not suggested that any such expedient has been adopted by the prosecuting officers of Maryland in the present case. But it must be remembered that the charge of conspiracy is bound up with the charge of murder, and that the same train of circumstances led up to both. It is submitted that the case can not be disposed of upon the simple theory that Federal officers can never be called upon to commit "conspiracy" in the abstract. The name given to the charge is immaterial. The Court must look behind the name to the actual circumstances under which it arose. Judged by this test, it is submitted that the present charge of conspiracy bears a direct relation to the acts done by the accused "under color of their office" and "under color of the revenue laws of the United States." And if that is true, then the prosecution was properly removable to the Federal Court.

Moreover, it must be remembered that it is "*color* of office" and "*color* of the law" which the statute makes ground for removal of the cause. "Color of office" covers something which may prove insufficient as a defense, as well as something which may prove sufficient. (Bouvier, L. D., and cases cited in respondents' brief in Case A, at pp. 26, 27.) The removal statute on this point differs sharply

from the statute which confers upon Federal officers the right to be discharged upon *habeas corpus*. That statute (Rev. Stats. 753) says nothing of "*color* of office." It grants the privilege of discharge upon *habeas corpus* only where the accused is in custody—

> *for an act done or omitted in pursuance of a law of the United States.*

"Color of office" in that case is not enough. The accused can not show merely that he is in custody for an act which he claims was done under *color* of his office or of the law. He must allege that he is in custody for an act which was actually done in pursuance of the law, and he must support his allegations by proof.

In the removal statute (Section 33 of the Judicial Code), on the other hand, such proof is not needed. The statute authorizes removal—

> when the acts of the defendant complained of were done, or *claimed* to have been done, in the discharge of his duty as a Federal officer. It makes such a *claim* a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the *claim* proves unfounded. *Tennessee v. Davis,* 100 U. S. 257, 261.

The reason for the distinction is clear. When a Federal officer is released on *habeas corpus* under Rev. Stats. 753, the case is ended. He is finally discharged from custody "without a stain on his character." The State has no opportunity to test his guilt or innocence by a trial on the merits or to

secure his punishment if he is guilty. The protection afforded by Rev. Stats. 753 is, moreover, not confined to *revenue* officers or to officers of Federal Courts. It extends to "*all persons*" in custody for acts done or omitted in pursuance of a law of the United States.

For these reasons the Federal courts are naturally reluctant to grant relief by *habeas corpus* under Rev. Stats. 753, since such relief operates as a final bar to prosecution and precludes the State from all remedy.

Drury v. *Lewis*, 200 U. S. 1.
Baker v. *Grice*, 169 U. S. 284.
Ex parte Royall, 117 U. S. 241.

In removal cases, on the other hand, the same reasoning does not apply. Where a revenue officer is removed for trial under Section 33 of the Judicial Code, he is not released from all ultimate liability. A trial on the merits is still possible. Only the court is changed. *Delaware* v. *Emerson*, 8 Fed. 411. The State may still prosecute him, imprison him, and, if need be, even hang him, through the agency of the Federal Court.

Removal, in other words, possesses none of the attributes of *finality* which are involved in a discharge on *habeas corpus* under Rev. Stats. 753. And the statutes recognize that this is true. For discharge on *habeas corpus* the accused must prove facts which clearly demonstrate his practical innocence. For removal he need only make a "claim"

of Federal authority. *Tennessee* v. *Davis, supra.* For discharge on *habeas corpus,* he must show that he was in fact acting in pursuance of law. For removal, he need only show a " color " of authority under the law.

It is submitted that under this reasoning the accused officers have established a claim which warranted the court in ordering their removal and in denying the motion to remand.

II

THE DECISION OF THE DISTRICT COURT GRANTING THE PETITION FOR REMOVAL, AND DENYING THE MOTION TO REMAND, WAS AN EXERCISE OF LAWFUL JUDICIAL DISCRETION, AND CAN NOT BE CONTROLLED BY MANDAMUS.

This question also has been treated at length in the respondents' brief in Case A (Original No. 23), at pages 27–34.

In the case at bar, however, certain additional points must be noticed. The petition of the accused officers for removal included, of course, full allegations of the facts upon which the right to removal was based—allegations, for example, that the petitioners were Federal officers, that they were engaged in the performance of these duties (the duties being set forth in detail), and that the prosecution had been brought against them for acts alleged to have been done while they were so engaged. *The motion to remand, interposed by the State of Maryland, directly traversed these allegations.* Among the grounds assigned for that motion were these

(Exhibit A to Petition for mandamus, at pp. 39–41):

> (1) Because the allegations of the second paragraph of the amended petition are untrue. (This paragraph contained a description of the official capacity of the agents and of Trabing, the chauffeur.)
>
> (3) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, *and in part untrue.*
>
> (9) And for other good and sufficient reasons to be shown at the hearing.

It is very clear, therefore, that by the petition for removal, and by the motion of the State to remand, issues both of law and fact (or issues of mixed law and fact) were raised. The allegations of the petition for removal are to be taken to be *prima facie* true. *Carlisle* v. *Sunset Telephone Co.*, 116 Fed. 896. When their truth is directly challenged by the party who seeks to block removal, it becomes the duty of the District Court to determine the issue as to their truth. *Stone* v. *South Carolina*, 117 U. S. 430, 432.

It is submitted that the District Court, in deciding these issues, acted within the bounds of its lawful discretion. The petition of the accused officers for removal was duly verified under oath and was signed by all five of the petitioners. The District Court was entitled to treat that petition, so verified, as *evidence* of the facts therein contained. If it had chosen to *disbelieve* that evidence as untrue or fraudulent, and had remanded the cause to the

State court, the accused officers would have had no remedy to compel the District Court to alter its decision. Least of all would they have had a remedy by mandamus. Their claim to such a remedy would be regarded as absurd.

It is submitted that the same rule applies where the District Court has decided to *believe* their testimony. The writ of mandamus can not be used to compel an inferior court to decide an issue of fact, or of mixed law and fact, in any particular way, otherwise than in accordance with the dictates of its own judgment.

United States v. *Lawrence, Judge*, 3 Dall. 42.
Ex parte Bradstreet, 8 Pet. 588.
Ex parte Taylor, 14 How. 2, 12.
Ex parte Secombe, 19 How. 9, 15.
Ex parte Newman, 14 Wall. 152.
Ex parte Cutting, 94 U. S. 14, 20.
Ex parte Roe, 234 U. S. 70, 73.
Ex parte Slater, 246 U. S. 129, 134.
Ex parte Chicago, Rock Island and Pacific Ry., 255 U. S. 273, 275.

The rule that the writ of mandamus can not be used to perform the office of an appeal or writ of error, or to review the discretion of an inferior court, applies *even to cases where no appeal or writ of error is given by law*. *In re Rice*, 155 U. S. 396, 403.

If the question involved is one of jurisdiction, the writ of mandamus will lie only where there is

no shadow of jurisdiction in the court below. If the jurisdiction of that court is doubtful, the remedy by mandamus will be refused.

In re Cooper, 143 U. S. 472, 506, 509.
Ex parte Muir, 254 U. S. 522.

And it is well settled that mandamus is not the proper remedy to control decisions of lower courts in *civil* removal cases.

Ex parte Harding, 219 U. S. 363.
Ex parte Hoard, 105 U. S. 578.

In none of the three cases where this Court has granted mandamus to remand *criminal* causes was the discretion of the lower court on issues of fact involved. In *Virginia* v. *Paul,* 148 U. S. 107, mandamus was granted solely on the ground that the attempt to remove was premature, since no "prosecution" was commenced until an indictment had been found. In *Virginia* v. *Rives,* 100 U. S. 313, and in *Kentucky* v. *Powers,* 201 U. S. 1, the lower courts had attempted to remove causes under Rev. Stats. 641 on the ground that the States concerned had denied the petitioners their equal rights. In both cases it was shown that the *States* had made no such denial, and that the denial involved was due to the acts of local officials unauthorized by law. In both cases the insufficiency of the petitions for removal, in point of *law,* was apparent on the face of the record. In neither case was there any issue of *fact* as to removal which the lower court could properly determine.

In the case at bar, it is submitted, the situation is clear. The District Court had before it certain issues of fact and law, or of mixed fact and law, which it alone could properly decide. Its decision on those issues can not properly be reversed by a writ of mandamus.

In *Tennessee* v. *Davis*, 100 U. S. 257, 261, this Court pointed out:

> But the act of Congress authorizes the removal of any cause, when the acts of the defendant complained of were done, *or claimed to have been done,* in the discharge of his duty as a Federal officer. *It makes such a claim a basis for the assumption of Federal jurisdiction of the case, and for retaining it, at least until the claim proves unfounded.*

It is submitted that the accused officers in this case have made out such a *claim*. Upon the conflicting evidence before it, the District Court has determined that the claim appears to be well founded. If the claim should later appear to be unfounded, it is presumed that the District Court will proceed no further. But upon the record before this Court it is submitted that there can be no ground for extraordinary remedies. The District Court has decided in accordance with the dictates of its judgment upon questions both of law and of fact. Its discretion should not now be reviewed by mandamus.

CONCLUSION

It is therefore respectfully submitted that the rule should be discharged and that the petition for a writ of mandamus should be denied.

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NOVEMBER, 1925.

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